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LINGKARAN HARTANIAGA SDN BHD v. LEMBAGA TABUNG HAJI & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[ORIGINATING SUMMONS NOS: WA-24NCC(ARB)-40-12-2023 & WA-24NCC(ARB)-38-10-2023]
1 APRIL 2024

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Abstract – *A court should not rehear disputes between parties to an arbitration. The arbitrator is the sole judge of the disputes and the court has no jurisdiction to substitute its own interpretation of the laws and facts reached by the arbitrator, however erroneous it may be. In the setting aside of an arbitration award, the court shall not delve into the merits of the disputes brought forth during the arbitration proceedings. The scope of public policy to set aside an arbitral award should only be invoked where there is a violation of the most basic notions of morality and justice.*

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ARBITRATION: *Proceedings – Jurisdiction – Rehearing of disputes – Whether courts could rehear disputes between parties to arbitration – Whether arbitrator sole judge of dispute – Whether there was breach of rule of natural justice – Whether there was conflict of interest – Whether there was likelihood of bias by arbitrator – Whether there were justifiable doubts as to arbitrator's impartiality or independence – Whether court could express views on correctness or otherwise of arbitrator's conclusions*

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ARBITRATION: *Award – Setting aside – Application for – Whether courts could rehear disputes between parties to arbitration – Whether arbitrator sole judge of dispute – Whether there was breach of rule of natural justice – Whether there was conflict of interest – Whether there was likelihood of bias by arbitrator – Whether there were justifiable doubts as to arbitrator's impartiality or independence – Whether court could express views on correctness or otherwise of arbitrator's conclusions*

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Lingkaran Hartaniaga Sdn Bhd ('LHSB') filed an originating summons application ('OS 40-12') seeking to set aside an arbitration award and the correction to the award ('arbitral award') under ss. 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005 ('AA'). On the other hand, Lembaga Tabung Haji ('LTH') filed an originating summons application to register and enforce the arbitral award under ss. 36(1), 38(1), 38(2), 39 and 50 of the AA. On 20 May 2016, LHSB and LTH entered into a shares sale agreement ('LHSB SSA') wherein LTH agreed to purchase a total of 3,056,050 ordinary shares owned by LHSB in Emrail Sdn Bhd ('Emrail'). The said 3,056,050 ordinary shares formed 15.28% of the issued and paid up shares of Emrail ('option shares'). On 10 June 2016, LTH

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entered into a share sale agreement with Emrail Consolidated Sdn Bhd ('ECSB') together with LHSB and other parties for, *inter alia*, the sale and transfer of the option shares to ESCB for the amount of RM31,584,277 ('LTH SSA'). The LTH SSA was contingent upon another share sale agreement ('other SSA') which stipulated that the perfection of the condition precedent of the LTH SSA was based on the other SSA becoming unconditional ('conditions precedent'). However, the LTH SSA did not satisfy its conditions precedent as the other SSA was terminated. With the termination of the other SSA, LTH's plans to sell the option shares through the LTH SSA therefore did not materialise as the conditions precedent of the LTH SSA had not been met, rendering all of the terms of the agreement to be unenforceable. To date, the option shares had not been transferred to ESCB and LTH remained the owner still. The only agreement which remained valid and enforceable was the stand-alone LHB SSA. On 26 April 2017, LTH issued a notice to LSB to exercise the put option pursuant to cl. 8 of the LHSB SSA by requiring LHSB to purchase the option shares at the price of RM21,298,423.45 ('put option notice'). On 15 May 2017, LHSB acknowledged the put option notice and did not object nor dispute the exercise and enforceability of the same. On 9 October 2017, LHSB also acknowledged the shortfall from LTH's value of investment and proposed to pay the sum in instalments. The first instalment was for the amount of RM2,000,000, which LHSB made payment for to LTH. LTH took the position that the sum of RM2,000,000 paid by LHSB was a part of the payment of the total put option price, *ie*, RM21,298,423.45 and this was duly admitted by LHSB. However, no further payment was made by LHSB to settle the remainder balance of the put option. LTH then proceeded to initiate arbitration proceedings against LHSB by serving the notice of arbitration and the dispute between the parties were thereby referred to arbitration. The arbitrator delivered the arbitral award which, *inter alia*, awarded a declaration of specific performance directing LHSB to pay the sum of RM19,298,423.45 being the remaining amount payable under the put option. The arbitrator also directed LHSB to pay LTH the total sum of RM348,287.23 being the sum paid by LTH to the AIAC in respect of the arbitrator's fee and administrative costs. In OS 40-12, LHSB applied to set aside the arbitral award on the following grounds (i) the arbitral award was in conflict with the public policy of Malaysia pursuant to s. 37(1)(b)(ii) of the AA for going against the statutory provisions of ss. 11(1)(c) and 20(1)(a) of the Specific Relief Act 1950 ('SRA') and the fundamental legal principles established by high legal authorities; (ii) the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the submission to the arbitration and contained decision on matters beyond the scope of the submission to arbitration pursuant to s. 37(1)(a) of the AA; and (iii) there was a breach of the rules of natural justice occurred during the arbitral proceedings and/or in connection with the making of the arbitral award pursuant to ss. 37(2)(b)(i) and/or 37(2)(b)(ii) of the AA.

Held (dismissing LHSB's application; allowing LTH's application):

(1) A court should not rehear the disputes between the parties to the arbitration. The arbitrator is the sole judge of the dispute and the court has no jurisdiction to substitute its own interpretation of the law and facts reached by the arbitrator, however erroneous it may be. This meant that in the setting aside of an arbitration award, this court shall not delve into the merits of the disputes which was brought forth during the arbitration proceedings. Accordingly, this court would not sit as an appellate court and substitute the decision reached by the arbitrator in respect of the validity or otherwise of the exercise of the put option by LTH and the interpretation of the provisions of the SRA on the reliefs of specific performance. This court expressed no views on the correctness or otherwise of the arbitrator's conclusions on the merits of the LTH's claims. (paras 30 & 33)

(2) The relief of specific performance was an equitable remedy and in making the consequential orders, the arbitrator was merely making expressly the steps that ordinarily would follow the relief of specific performance of a sale and purchase of shares. This was well within his authority and jurisdiction. LHSB's contention that the arbitrator had 'gone on a frolic of his own' was made without any concrete reference as to which rule of natural justice had been breached, how it was breached and, more significantly, how the breach was material to the outcome of the arbitration. The complaints by LHSB simply did not pass muster. Further, the arbitrator's decision not to consider an unpleaded point was a matter wholly within his prerogatives and it was certainly not a matter that came within any of the principles entitling the setting aside of his arbitral award. (paras 41, 44, 47 & 50)

(3) There was no 'private conversation' between the arbitrator and counsel for LTH. What had transpired was clearly a casual conversation in a setting where both parties knew that the room was being recorded. There was no act of concealment of this 'private conversation' from LHSB's counsel at all. There was no revelation that needed to be made to LHSB regarding the arbitrator and LTH's counsel's past affiliation. It could not be considered to give rise to justifiable doubts as to the arbitrator's impartiality or independence. There was no conflict of interest and the mere fact that LTH's counsel was a pupil-in-chamber in the firm where the arbitrator was then practicing, did not give rise to a real danger of bias so as to preclude the arbitrator from hearing and/or determining the matter from the very outset and from continuing to hear and/or adjudicate on the matter. Indeed, the plaintiff had not demonstrated that there was a real likelihood of bias by the arbitrator. (paras 62-66)

Case(s) referred to:

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***
Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd [1997] UKHL 17 ***(refd)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***
Hope v. Walter [1900] 1 Ch 257 ***(refd)***
Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***
Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC ***(refd)***
Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal [2020] 9 CLJ 466 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 14, 36(1), 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i), (ii), 38(1), (2), 39(1)(a)(iv), (v), (vii), (b)(ii), 50
Rules of Court 2012, O. 7 r. 2
Rules of the Federal Court 1995, r. 137
Specific Relief Act 1950, ss. 11(1)(c), 20(1)(a)

(Originating Summons No: WA-24NCC(ARB)-40-12-2023)
For the plaintiff - Idza Hajar Ahmad Idzam, Nan Muhammad Ridhwan Rosnan, Aiesyah Mohd Mustafa Kamal & Muhammad Hibri Nazim; M/s Zul Rafique & Partners
For the defendant - Ooi Suan Kim & Boo Honn Chin; M/s OS Kim & Assocs

(Originating Summons No: WA-24NCC(ARB)-38-10-2023)
For the plaintiff - Ooi Suan Kim & Boo Honn Chin; M/s OS Kim & Assocs
For the defendant - Idza Hajar Ahmad Idzam, Nan Muhammad Ridhwan Rosnan, Aiesyah Mohd Mustafa Kamal & Muhammad Hibri Nazim; M/s Zul Rafique & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] Originating Summons No: WA-24NCC(Arb)-40-12/2023 ("OS 40-12") is an application filed by Lingkaran Hartaniaga Sdn Bhd ("LHSB") seeking to set aside an arbitration award dated 11 August 2023 and the correction to the award dated 29 August 2023 (collectively referred as "the arbitral award") under ss. 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005 ("AA 2005").

[2] On the other hand, Originating Summons No: WA-24NCC(Arb)-38-10/2023 ("OS 38-10") is Lembaga Tabung Haji ("LTH")'s application to register and enforce the arbitral award under ss. 36(1), 38(1), 38(2), 39 and 50 of the AA 2005.

[3] Both OS 40-12 and OS 38-10 were fixed and heard together.

[4] On 29 February 2024, I dismissed LHSB's application under OS 40-12 and allowed LTH's application under OS 38-10 with costs.

[5] Since the legal arguments and the considerations for both OS 40-12 and OS 38-10 are the same, in this judgment, I will only focus on the application by LHSB in OS-40-12. My conclusions on the contentions made by LHSB in OS 40-12 would apply to OS-38-10 as well.

Background Facts

[6] On 20 May 2016, LHSB and LTH entered into a shares sale agreement ("LHSB SSA") wherein LTH agreed to purchase a total of 3,056,050 ordinary shares owned by LHSB in Emrail Sdn Bhd ("Emrail"). The said 3,056,050 ordinary shares formed 15.28% of the issued and paid-up shares of Emrail ("option shares").

[7] On 10 June 2016, LTH entered into a share sale agreement with Emrail Consolidated Sdn Bhd ("ECSB") together with LHSB and other parties for, *inter alia*, the sale and transfer of the option shares to ECSB for the amount of RM31,584,277 ("LTH SSA").

[8] The LTH SSA was contingent upon another share sale agreement dated 25 June 2015 ("other SSA") as evidenced by cls. 4.1 and 4.2 of the LTH SSA which stipulated that the perfection of the condition precedent of the LTH SSA, is based on the other SSA becoming unconditional ("conditions precedent"). However, the LTH SSA did not satisfy its conditions precedent as the other SSA was terminated.

[9] The termination of the other SSA is evidenced by the Bursa announcement dated 27 February 2017, which states:

> *On behalf of the Board of Premier Nalfin, HLIB wishes to announce that Premier Nalfin, Emrail Consolidated, Magniplan, Noblemax Resources and Lingkaran Hartaniaga have on 27 February 2017 vide a termination letter mutually agreed to terminate the SSA* (SSA Termination").
>
> As such, *the SSA shall be null and void and be of no further effect and neither party shall have any claim whatsoever against the other in connection (directly or indirectly) with the SSA and the matters contemplated in the SSA*, save in respect of any antecedent breach.
>
> In light of the SSA Termination, the Proposed Restructuring Scheme is accordingly aborted and a letter will be submitted to the SC to withdraw the application to the SC pertaining to the Proposed Restructuring Scheme (which was submitted on 29 June 2016) ("SC Application"). The SSA Termination will have no impact on the earnings per share and net asset per share of Premier Nalfin.
>
> *In addition, Emrail Consolidated, Magniplan, Noblemax Resources and Lingkaran Hartaniaga have agreed to issue a written notice to LTH and Premier Nalfin as soon as practicable after the SSA Termination to terminate the LTH SSA with immediate effect.*
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> ("Bursa Announcement")
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> (emphasis added)

[10] With the termination of the other SSA, LTH's plans to sell the option shares through the LTH SSA therefore did not materialise as the conditions precedent of the LTH SSA have not been met, rendering all of the terms of the agreement to be unenforceable.

[11] To date, the option shares have not been transferred to ECSB and LTH remains the owner still. The only agreement which remains valid and enforceable is the stand-alone LHSB SSA.

[12] On 26 April 2017, LTH issued a notice to LHSB to exercise the put option pursuant to cl. 8 of the LHSB SSA by requiring LHSB to purchase the option shares at the price of RM21,298,423.45 ("put option notice").

[13] On 15 May 2017, LHSB acknowledged the put option notice and did not object nor dispute the exercise and enforceability of the same.

[14] On 9 October 2017, LHSB also acknowledged the shortfall from LTH's value of investment and proposed to pay the sum in installments. The first installment was for the amount of RM2,000,000 to be paid on or before 31 March 2018.

[15] On 31 March 2018, LHSB made a payment for the sum of RM2,000,000 to LTH. LTH took the position that the sum of RM2,000,000 paid by LHSB is a part of the payment of the total put option price *ie*, RM21,298,423.45 and this was duly admitted by LHSB in its letter dated 19 August 2019.

[16] However, no further payment was made by LHSB to settle the remainder balance of the put option.

[17] LTH then proceeded to initiate arbitration proceedings against LHSB by serving the notice of arbitration on 13 April 2022 and the dispute between parties were thereby referred to arbitration. Soon after, Mr Robert Amirtharaj Lazar ("the learned arbitrator") was appointed as the sole arbitrator.

[18] After hearing the parties and their witnesses and considering their submissions, including submissions on cost, the learned arbitrator delivered the arbitral award which, *inter alia*, awarded the following:

(i) a declaration of specific performance directing LHSB to pay the sum of RM19,298,423.45 being the remaining amount payable under the put option;

(ii) a consequential award that the completion of the sale and purchase of the option shares is to take place on a date not earlier than one month from the date of the publication of the arbitral award. LTH is to give seven-days' notice of the intended date of completion and on that day, LHSB is to pay the sum of RM19,298,423.45 to LTH and in return, LTH is to deliver the share certificates of the option shares and the duly executed and sealed transfer forms pertaining thereto;

(iii) costs in favour of LTH to be paid by LHSB in the sum of RM125,000 as party and party costs; and

(iv) that the learned arbitrator's fees in the sum of RM264,774.22 and service tax thereon (at the rate of 6%) in the sum of RM15,886.45 is to be borne by LHSB.

[19] The learned arbitrator also directed LHSB to pay LTH the total sum of RM348,287.23 being the sum paid by LTH to the AIAC in respect of:

(i) the total of the learned arbitrator's fee of RM280,660.67;

(ii) the administrative costs of the AIAC in the sum of RM62,262.96 (inclusive of service tax); and

(iii) the cost of the room reservations for the hearings in the sum of RM5,363.60.

[20] In the OS 40-12, LHSB has applied to set aside the arbitral award seeking for the following reliefs:

> (a) an order declaring that by the learned arbitrator having delivered the award that incontrovertibly goes against the cardinal principle under ss. 11(1)(c) and 20(1)(a) of the Specific Relief Act 1950 and by arbitrarily allowing LTH's sole relief for specific performance directing LHSB to make a monetary payment of RM19,298,423.45 to LTH, the award by the learned arbitrator dated 11 August 2023 read together with the Correction to the award dated 29 August 2023 are in conflict with the public policy of Malaysia for breach of rules of natural justice and that on this ground, the award read together with the Correction to the award be set aside pursuant to s. 37 of the AA 2005;
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> (b) an order declaring that by the learned arbitrator going beyond LTH's sole relief in granting consequential awards directing for the completion of the sale and purchase of the option shares including the method on how such completion ought to take place, the learned arbitrator had arbitrarily dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration and or contains decisions on matters beyond the scope of the submission to arbitration and on this ground, the award read together with the Correction to the award be set aside pursuant to s. 37 of the AA 2005;
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> (c) an order declaring that by the learned arbitrator disregarding the documentary evidence that LTH's wrongful put option notice dated 26 April 2017 was based on management accounts and not on the agreed term of audited Consolidated Profit After Tax, the learned arbitrator had acted in clear defiance of the fundamental legal principle established by high legal authorities and that the award was given in breach of the rules of natural justice and on this ground, the award read together with the Correction to the award be set aside pursuant to s. 37 of the Arbitration Act 2005;

(d) an order declaring that by the learned arbitrator's apparent bias during the arbitral proceedings and or in connection with the making of the award, given in breach of the rules of natural justice when the learned arbitrator ignored LTH's admission that there were negotiations towards a settlement which was the reason why the RM2,000,000 was paid to LTH, LHSB is entitled to the refund of the said RM2,000,000 after negotiations towards a settlement agreement was unsuccessful;

(e) consequently, LTH be ordered to forthwith repay and refund to LHSB the sum of RM2,000,000 which LTH alleged as part payment to its purported Option Share Price since there is no put option being effectively and or validly triggered by LTH as a consequence to the setting aside of the award read together with the Correction to the award pursuant to s. 37 of the Arbitration Act 2005;

(f) interest at the rate of 5% per annum on the sum of RM2,000,000 or any other sum as deemed appropriate by this Court from 31.03.2018 or any other date that this Honourable Court deems fit and just until realisation.

[21] LHSB rests its setting aside application in OS 40-12 on the following three broad grounds:

(i) the arbitral award is in conflict with the public policy of Malaysia pursuant to s. 37(1)(b)(ii) of the AA 2005 for going against the statutory provisions of ss. 11(1)(c) and 20(1)(a) of the Specific Relief Act 1950 and the fundamental legal principles established by high legal authorities ("first ground");

(ii) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration and contains decisions on matters beyond the scope of the submission to arbitration pursuant to s. 37(1)(a) of the AA 2005 ("second ground");

(iii) there is a breach of the rules of natural justice occurred during the arbitral proceedings and or in connection with the making of the arbitral award pursuant to s. 37(2)(b)(i) and/or s. 37(2)(b)(ii) of the AA 2005 ("third ground").

[22] With respect to learned counsel for LHSB, I find no merits to the setting aside application in OS 40-12 and the grounds for my decision are set out below.

Court's Considerations

[23] In respect of the first ground, learned counsel for LHSB contended that the arbitral award is in conflict with the public policy of Malaysia pursuant to s. 37(1)(b)(ii) of the AA 2005 for going against the statutory provisions of ss. 11(1)(c) and 20(1)(a) of the Specific Relief Act 1950 and the fundamental legal principles established by high legal authorities.

[24] In particular, it was contended that in the arbitral award, the learned arbitrator had acted against the public policy in Malaysia when he granted LTH the claims under cl. 8 of the LHSB SSA for specific performance of the put option.

[25] In this connection, LTH had issued its notice to rectify breach on 27 May 2021 to LHSB and had sought for "[a] declaration of specific performance directing (LHSB) to pay the sum of RM19,298,423.45 being the remaining amount payable under the put option".

[26] It was contended that in granting LTH the reliefs sought, the learned arbitrator had made an award that is against public policy in that:

(i) the learned arbitrator had failed to consider cls. 21.1 and 21.3 of LHSB SSA which stipulate that the right of specific performance would only be available if LHSB as the vendor fails for any reason whatsoever to complete the agreement and that LTH's right to specific performance would be available only if it exercises the right within 60 days from the "unconditional date". Since the LHSB SSA was completed on 3 June 2016, it was contended that the learned arbitrator had "breached the rules of natural justice" in failing to give effect to cls. 21.1 and 21.3;

(ii) further, it was argued that the award of specific performance is in complete defiance of ss. 11(1)(c) and 20(1)(a) of the Specific Relief Act 1950 ("SRA 1950").

[27] With respect, the issues relating to cls. 21.1 and 21.3 were not issues that were pleaded and thus these issues were not considered by the learned arbitrator at all.

[28] What was pleaded and considered by the learned arbitrator was whether specific performance can be granted in the light of ss. 11(1)(c) and 20(1)(a) of the SRA 1950. This was considered and analysed by the learned arbitrator in paras. 96 to 110 of his award which are reproduced below:

Is the Relief of Specific Performance available to the Claimant

96. By exercising the put option, the Claimant has in effect become a vendor and correspondingly the Respondent has become a purchaser.

97. Illustration (c) to s. 11(2)(c) of the Specific Relief Act under the rubric:

> When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

clearly shows that specific performance may be ordered in favour of a purchaser of shares in a company which "are limited in number and not always to be had in the market." Email is a private limited company. Its shares are not publicly available.

98. Illustration (c) also makes reference to an action for specific performance being granted, in order for the status of shareholder to be conferred.

99. Although the primary remedy that the common law affords for a breach of contract (which would include a contract coming into existence upon the exercise of an option) is an award of damages, the remedy of specific performance, like all equitable remedies is a discretionary remedy and available where it can be demonstrated that damages were inadequate as a remedy, This principle is recognised by s. 12(1)(c) of the Specific Relief Act.

100. One of the cornerstones of equitable relief is the principle of mutuality. Thus if one party, in a given and defined situation, can obtain the remedy of specific performance, this principle will equally apply to the converse party. See for example, 'Fry on Specific Performance, 6* Edition at pages 222-223!

101. It is almost universally recognised that a purchaser in this given situation is entitled to specific performance, then the principle of mutuality will confer on a vendor the same expectation in law.

102. By exercising the put option, the Claimant has manifested its intention to exit as a shareholder of Email and to restore the Respondent in that capacity. Of course the Claimant will then recover the purchase price agreed in the formula provided by cl. 8 of the Lingkaran SSA.

103. Payment of the purchase price cannot be equated to an award of damages even if by this process the Claimant stands to make a profit from its initial investment.

104. The Claimant will therefore be able to rid itself of its property and will avoid the need to make a claim in damages. In the case of real property, it has been said that it is possible for a vendor of land to "thrust the property down the purchaser's throat" [See *Hope v. Walter* (1900) 1 Ch 257 @ 258]

105. In principle a vendor of shares in a private limited company should be in the same position as a vendor of land and I therefore recognise the Claimant's principal claim for specific performance.

106. However counsel for the Respondent had urged upon me that sections 11(1)(c) and 20(1)(a) of the Specific Relief Act will operate to preclude the grant of an award of specific performance in this instance.

107. In this context counsel for the Respondent has reiterated that this provision reflects the off-quoted principle that specific performance will not be awarded where damages would suffice as adequate relief.

108. I have already referred to s. 11(1)(c) in the context of a claim involving a sale of shares in a limited company and I find that an award of damages will not be an adequate remedy. Although the main relief pleaded is for payment of a monetary sum, that is in the nature of a vendor's action and cannot be equated with 'damages or in the language of the Specific Relief Act fur "pecuniary compensation".

109. Section 20(1)(a) mirrors s. 11(1)(c) in this respect. I find that "compensation in money" is not an adequate relief because not only is payment of the purchase price not compensation but more importantly the Claimant will not be able to rid itself of its status as a shareholder.

110. Although the thrust of the relief makes reference to the payment of RM19,298,423.45 that in my view and I so hold, does not disentitle the Claimant from obtaining a claim for specific performance.

[29] In arriving at his decision that specific performance can be granted, it cannot be said that the decision in the arbitral award is contrary to public policy. Indeed, learned counsel for LHSB has not shown how and/or what "public policy" had been breached by the arbitral award made by the learned arbitrator.

[30] Further, it is a trite and established principle that a court should not rehear the disputes between the parties to the arbitration. The arbitrator is the sole judge of the disputes and the court has no jurisdiction to substitute its own interpretation of the law and facts reached by the arbitrator however erroneous it may be. This means that in the setting aside of an arbitration award, this court shall not delve into the merits of the disputes which was brought forth during the arbitration proceedings. Gopal Sri Ram JCA explained in the case of *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; [1999] 2 MLJ 481 regarding the limited jurisdiction of the court as follows:

> In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v. Union of India* AIR 1989 SC 777 at p 780:
>
> when a court is called upon to decide the objections raised by a party against an arbitration award, **the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits**.
>
> (emphasis added)

[31] The aforesaid principle was recently reiterated by our Federal Court in the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413 ("*Jan De Nul*"), where it held as follows:

> The effect of ss. 8, 9, 3 7 and 42 of the AA 2005 is that *the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005* which for all intent and purposes, is to promote one-stop adjudication in line with the international practice. (see: *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highland Development Authority v. Imprigelo SpA & Others* [2005] UKHL 43). *In this regard, the court*

needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.

(emphasis added)

[32] This was affirmed by the Federal Court in the following year in the case of *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal* [2020] 9 CLJ 466 stating as follows:

[10] **The principle is trite that courts do not exercise appellate jurisdiction over arbitration awards**: See *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. The only provisions in the Act that provide for the setting aside of domestic awards are section 37(1) and section 42(1) to (4) of the Act (before its deletion).

(emphasis added)

[33] Accordingly, this court will not sit as an appellate court and substitute the decision reached by the learned arbitrator in respect of the validity or otherwise of the exercise of the put option by LTH and the interpretation of the provisions of the SRA 1950 on the reliefs of specific performance. For the avoidance of any doubt, this court expresses no view on the correctness or otherwise of the learned arbitrator's conclusions on the merits of LTH's claims.

[34] For the reasons above, I find no merits in LHSB's first ground.

[35] In its second ground, it was contended by learned counsel for LHSB that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration and contains decisions on matters beyond the scope of the submission to arbitration pursuant to s. 37(1)(a) of the AA 2005.

[36] In this regard, it was contended that upon granting the prayers for specific performance, at para. 114(2) of his award, the learned arbitrator also made consequential orders for the completion of the sale and purchase of the option shares. More specifically, the learned arbitrator made the following order:

A consequential award that completion of the sale and purchase of the option shares is to take place on a date not earlier than one month from the date of the publication of this award. The Claimant is to give 7 days' notice of the intended date of completion and on that day the Respondent is to pay the sum of RM19,298,423-45 to the Claimant and in return the Claimant is to deliver the share certificates to the option shares and the duly executed and sealed transfer forms pertaining thereto.

[37] The aforesaid order was made by the learned arbitrator notwithstanding that the relief that was prayed for merely sought for a declaration directing LHSB to pay the sum of RM19,298,423.45. In this, it is contended that the learned arbitrator had gone on "a frolic of his own" when he made the consequential order.

[38] LHSB contended that the issue on the "completion of the sale and purchase of the option shares" and the method on how such completion ought to take place was never the parties' terms and/or scope of the submission to arbitration and was never brought up by any parties including LTH during the hearings or in the written submissions at the arbitration.

[39] LHSB also took issue with the fact that the learned arbitrator had made references to the English cases of *Hope v. Walter* [1900] 1 Ch 257, 258 (Lindley LJ) and *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1997] UKHL 17; [1998] AC 2; [1997] All ER 297; [1997] 3 WLR B98 in the award without giving opportunity for counsel for LHSB to respond.

[40] Again, regrettably I am unable to agree with learned counsel for LHSB on the second ground as well.

[41] The relief of specific performance is an equitable remedy and in making the consequential orders, the learned arbitrator was merely making expressly the steps that ordinarily would follow the relief of specific performance of a sale and purchase of shares. This is well within his authority and jurisdiction. Further, the reference to the two English cases was simply to fortify his decision on the decree of specific performance.

[42] In any case, learned counsel for LHSB has not demonstrated how a different outcome would be reached if LHSB were given the right and opportunity to submit on the two cases.

[43] LHSB contended that the learned arbitrator had "gone on a frolic of his own to ask numerous hypothetical and/or theoretical questions and answering for [LTH]'s counsel during the course of arbitration to repair and make out a case for [LTH] which [LTH] did not submit on".

[44] However, the aforesaid contention was made without any concrete reference as to which rule of natural justice had been breached, how it was breached and more significantly, how the breach was material to the outcome of the arbitration. LHSB also failed to demonstrate that the learned arbitrator would have reached a different conclusion but for the breach.

[45] In *Jan De Nul*, the Federal Court made it clear that the scope of public policy to set aside an arbitral award should only be invoked where there is a violation of the most basic notions of morality and justice. At para. [58], it states:

> [58] The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case *ie*, in instances where it appears a **violation of the most basic notions of morality and justice**. It covers fundamental principles of law and justice in substantive as well as procedural respect.
>
> (emphasis added)

[46] In the recent Federal Court case of *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 9 CLJ 213; [2020] 12 MLJ 198, the apex court set out succinctly the principles in the exercise of the court's discretion in an application to set aside an arbitration award. The relevant passage is worthy of reproduction in full as follows:

> [46] In our considered view, the opening words of sub-s 37(1) which employs the terms 'may be set aside' is plain and unambiguous. *Subsection 37(1) clearly provides that the High Court retains a residual discretion not to set aside an award even though a ground for setting aside may be made out*. What is important is to ascertain the principles applicable to the exercise of such discretion in cases where an application is grounded on breach of the rules of natural justice.
>
> ...
>
> [53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
>
> *(a) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;*
>
> *(b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;*
>
> *(c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;*
>
> *(d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;*
>
> (e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
>
> (f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
>
> (g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and
>
> (h) eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.
>
> (emphasis added)

[47] Clearly, applying the guidelines above, the complaints by LHSB above simply do not pass muster.

[48] LHSB contended that a breach of the rules of natural justice had occurred during the arbitral proceedings and/or in connection with the making of the award pursuant to s. 37(2)(b)(i) and/or s. 37(2)(b)(ii) of the AA 2005. In this regard, it is contended that the learned arbitrator had denied LHSB the right to be heard in the dismissal and or refused to consider a particular valid legal point raised by LHSB. More specifically, at para. 76 of the award, the learned arbitrator had refused to consider a legal point raised by LHSB on the basis that it was not specifically pleaded.

> 76. This point was not specifically pleaded in the Respondent's (Lingkaran's) Defence and hence I should pay little if no regard to this point of the submission.

[49] The point relates to LHSB's contention that LTH had failed to discharge its burden of proof in proving that it was entitled to exercise the put option under the LHSB SSA.

[50] The learned arbitrator's decision not to consider an unpleaded point is a matter wholly within his prerogatives and it is certainly not a matter that comes within any of the principles entitling the setting aside of his arbitral award. In any case, the learned arbitrator did in fact consider the point at paras. 76 and 77 of the award, which are reproduced below:

> 76. This point was not specifically pleaded in the Respondent's Defence and hence I should pay little if no regard to this point of the submission.
>
> 77. I note however that the Respondent is not for one moment saying that the audited accounts will show that the company did in fact meet the requirements of financial performance and therefore the trigger points in the put option clause were not activated. They are merely attacking the frailty of the notice itself and that it is a flawed notice. They are not relying on the substance of the matter.

[51] In its third ground, LHSB claimed that there was a breach of the rules of natural justice occurred during the arbitral proceedings and/or in connection with the making of the arbitral award pursuant to s. 37(2)(b)(i) and/or s. 37(2)(b)(ii) of the AA 2005.

[52] Learned counsel for LHSB referred to firstly, the learned arbitrator's "unnecessary action" of singling out LHSB's director and controlling shareholder, Tun Dato' Seri Zaki bin Tun Azmi ("Tun Zaki") and secondly, to the learned arbitrator's extensive private conversation with LTH's counsel when LHSB's counsel was absent during the arbitral proceedings and claimed that the learned arbitrator had failed to make prior disclosure of his shared past affiliation with LTH's counsel.

[53] It was contended that right from the start, during the first arbitration hearing on 7 March 2023, the learned arbitrator had openly "displayed biasness" by singling out LHSB's director and controlling shareholder, Tun Zaki. More specifically, the following comment by the learned arbitrator was referred:

> ARB They worry suddenly I'm going to ask them something. I was half expecting Tun Zaki to come and sit here.

[54] Learned counsel for LHSB contended that the learned arbitrator's statement above is a clear indication that he has a "personal score to settle with Tun Zaki". In further support, learned counsel for LHSB made a reference to the case of *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833; [2009] 2 MLJ 161, where Tun Zaki, the Chief Justice at that time, had delivered the majority judgment, dismissing the appellant's application under r. 137 of the Rules of the Federal Court 1995. The learned arbitrator had acted as lead counsel for the appellant. The contention was that the learned arbitrator had been disgruntled with Tun Zaki because of the decision made and had harboured a prejudice against him.

[55] With respect, the contention of biasness raised by learned counsel for LHSB is regrettable. It is not only without any basis but outright unfair to the learned arbitrator. How an argument can be made that merely because the learned arbitrator had acted as the lead counsel in a case that had been dismissed by the Federal Court then chaired by Tun Zaki, that this would give rise to the conclusion that the learned arbitrator had become disgruntled with Tun Zaki and by reason thereof, the learned arbitrator was biased against him, is simply baffling.

[56] It is also my judgment that the comment made by the learned arbitrator about Tun Zaki not attending the arbitral proceedings also does not suggest that the learned arbitrator "has a personal score to settle" with Tun Zaki as contended.

[57] The comment to my mind does not at all suggest that the learned arbitrator "appeared puffed up with conceit to allude that Tun Zaki, the former Chief Justice of Malaysia and also the current Chief Justice of Dubai International Financial Centre Courts will be worried to appear in front of him".

[58] LHSB's other grievance is that the learned arbitrator had engaged in an extensive private conversation with LTH's counsel when LHSB's counsel was absent during the arbitration hearing on 7 March 2023 and had failed to disclose their shared past affiliation at the law firm Shearn Delamore & Co.

[59] It was contended that this revelation was not made known to LHSB from the time of appointment and throughout the arbitral proceedings. Instead, LHSB only discovered the aforementioned extensive private

conversation and affiliation when playing back the video recording of the proceedings on 7 March 2023, specifically during the relevant parts when its counsel was absent.

[60] Learned counsel for LHSB contended that by the learned arbitrator's failure to disclose the aforesaid, the learned arbitrator has significantly breached his own duty of disclosure pursuant to the AIAC Code of Conduct for arbitrators and his mandatory statutory duty under s. 14 of the AA 2005 to disclose to LHSB as a party in the arbitration 'any circumstances likely to give rise to justifiable doubts as to' his 'impartiality or independence'.

[61] Again, I see no merits to LHSB's third ground.

[62] First and foremost, there was no "private conversation" between the learned arbitrator and counsel for LTH. What had transpired was clearly a casual conversation in a setting where both parties knew that the room was being recorded. This casual conversation took place while parties were waiting for the counsel for LHSB to arrive for the hearing. As a matter of fact, such recording had been requested by LTH's solicitors from AIAC, which upon receipt of the recording, was served to the learned arbitrator and LHSB's counsel on 22 March 2023. There was no act of concealment of this "private conversation" from LHSB's counsel at all.

[63] There is thus, no revelation that needed to be made to LHSB regarding the learned arbitrator and LTH's counsel's past affiliation. LTH's counsel had trained in Messrs Shearn Delamore as a pupil in chamber some 17 years ago when the learned arbitrator was a solicitor. During that period, LTH's counsel never worked with the learned arbitrator at all.

[64] The aforesaid affiliation, surely, cannot be not considered to give rise to justifiable doubts as to the learned arbitrator's impartiality or independence. There was no conflict of interest and the mere fact that LTH's counsel was a pupil-in-chamber in the firm where the learned arbitrator was then practising, to my mind, does not give rise to a real danger of bias so as to preclude the learned arbitrator from hearing and/or determining the matter from the very outset and from continuing to hear and/or adjudicate on the matter.

[65] There was no substantial affiliation between the learned arbitrator and LTH's counsel, which would give rise to the learned arbitrator having an interest towards the outcome of the award. The conversation between the learned arbitrator and LTH's counsel was purely casual, which was not even intended to be secretive.

[66] I agree with learned counsel for LTH that a reasonable and fair-minded person, knowing that LTH's counsel never worked for the learned arbitrator and only chambered in the learned arbitrator's past firm some 17 years ago, would not think that there would be a conflict of interest between parties. Indeed, the plaintiff has not demonstrated that there was a real likelihood of bias by the learned arbitrator in this case.

Conclusion

[67] Accordingly, it is the judgment of this court that LHSB's application in OS 40-12 to set aside the arbitral award is to be dismissed with costs. Correspondingly and following from the dismissal of OS 40-12, this court grants an order in terms of LTH's application to register and enforce the arbitral award in OS 38-10. This is because the grounds under ss. 39(1)(a)(iv), (v) and (vii) and s. 39(1)(b)(ii) of the AA 2005 relied upon by LHSB to oppose the registration and enforcement of the arbitral award are similar to the ss. 37(1)(a)(iv), (v), 37(1)(b)(ii) and 37(2)(b) of the AA 2005 relied upon for OS 40-12. I have also considered the technical objections raised by LHSB in OS 38-10 based on O. 7 r. 2 of the Rules of Court 2012 and the allegation of non-disclosure of the application to set aside the arbitral award. I found both objections to be unmeritorious.

[68] LHSB is to pay LTH the costs for both the applications fixed at RM5,000 for each application subject to the usual payment of the allocator.